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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

QUANTUM CHEMICAL CORPORATION and
QUANTUM EMPLOYEE STOCK OWNERSHIP PLAN
FOR HOURLY EMPLOYEES,
Petitioners,

v.

RUSSELL WULF, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

ARGUMENT

I. THIS CASE DOES PRESENT AN OPPORTUNITY FOR THE COURT TO RESOLVE THE SPLIT IN THE CIRCUITS REGARDING WHAT PLAN LANGUAGE IS REQUIRED TO INVOKE A DEFERENTIAL STANDARD OF REVIEW

A. The Sixth Circuit Did Employ A Presumption To Determine Whether The Plan Invoked A Deferential Standard Of Review

Despite the plaintiffs' insistence to the contrary, both the language and the effects of presumptions have crept into the caselaw, from the Sixth and certain other Circuits, in applying the deferential review standards of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). Certainly the sounds of presumptions echo throughout the majority's opinion below. Citing *Anderson v.*

Great West Life Assur. Co., 942 F.2d 392 (6th Cir. 1991), the majority emphasized that the settlor's grant of decision-making authority must be "clear" and "the exception." (Petitioners' App. 8a) In addition, in applying a tightly constricted interpretation of the Plan's grant of authority, the majority cited to and relied upon the Eleventh Circuit's decision in *Kirwan v. Marriott Corp.*, 10 F.3d 784 (11th Cir. 1994), which presumes that, when a plan is "ambiguous as to an Administrator's discretionary authority, we *will* apply the *de novo* standard of review." *Id.* at 789 (emphasis added). (Petitioners' App. 10a)[1]

The best evidence of presumptions, as well as the truest indicator of conflict among the Circuits, appears in the results. The Sixth Circuit majority insisted, for example, that "the placement of the reference to finality of the committee's determinations of disputed questions in the section granting authority to make rules does not indicate a clear grant of discretion to interpret the language of the Plan generally." (Petitioners' App. 9a) By somehow finding that the Plan § 8.07's unlimited rule-making authority limits fiduciary authority, the majority's reading simply cannot be squared with the Fourth Circuit approach exemplified by *De Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989), and *Boyd v. United Mine Workers Health & Retirement Funds*, 873 F.2d 57 (4th Cir. 1989).[2]

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[1] Although the Sixth Circuit did not admit to using the doctrine of *contra proferentum*, that doctrine is indicative of the artificial hurdles that the Sixth Circuit and certain other Circuits have placed in the path of settlors trying to invoke deferential review.

[2] Had the committee promulgated a formal rule interpreting "termination of employment," the Sixth Circuit majority apparently would have deferred to the committee. The majority does not explain, however, how the Committee's *failure to exercise* that authority could contradict the settlor's intent as to *the existence of* the necessary authority. *See Diaz v. Seafarer's International Union*, 13 F.3d 454, 457 (1st Cir. 1994) ("Given that the Trustees have the authority to *formulate* the rules and regulations that implement the Plan . . ., it is not subject to question that the Trustees have

As noted by a commentator on the *Wulf* case:

> Since every plan we have encountered describes the committee's discretion in the section of the plan granting power to make rules, this last observation could be used to call into question all grants of discretion to committees (at least in cases where the grant does not specifically note that it extends to questions involving interpretation of the plan language).

Rizzo, *6th Circuit Opinion May Halt Plan Spinoffs and Mergers*, 3 ERISA Litigation Rep. No. 4 3, 5 (1994).

B. A Split In The Circuits Does Exist Regarding What Plan Language Is Required To Invoke A Deferential Standard Of Review

The plaintiffs, citing to no authority, boldly assert that this petition demonstrates "[n]othing approaching a split between circuits, or even 'inconsistent internal precedent.'" (Respondent's Brief In Opposition, p. 6). That assertion is belied by the contradictory tests and results detailed in the Petition. (Petition, pp. 8-16). As early as 1990, the Seventh Circuit noted that the "circuit courts appear split over the degree of plan language specificity required to trigger deferential review of trustee determinations." *Diaz v. Seafarers International Union*, 13 F.3d at 457 (citing *Sisters of the Third Order of St. Francis v. SwedishAmerican Group Health Benefit Trust*, 901 F.2d 1369, 1371 (7th Cir. 1990)). In the nearly five years since the Seventh Circuit's decision in *Sisters of St. Francis*, that split, rather than narrowing, has grown wider and more confusing for the plan sponsors and fiduciaries who must comply with the terms of their ERISA plans.

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the . . . discretion to *interpret these rules and regulations* . . ." (quoting *Lockhart v. United Mine Workers of America 1974 Pension Trusts*, 5 F.3d 74, 78 n.6 (4th Cir. 1993) (emphasis in original)).

II. THIS CASE DOES PRESENT AN OPPORTUNITY TO CLARIFY THE SIGNIFICANCE OF INTERNAL REVENUE SERVICE POSITIONS IN INTERPRETING TAX-QUALIFIED PENSION PLANS

In their Brief in Opposition, the plaintiffs do not dispute that Quantum's second question is worthy of certiorari—[s]hould a court disregard relevant Internal Revenue Service positions when it reviews an interpretation of a retirement plan intended to qualify for tax-favored treatment under the Internal Revenue Code? Rather, the plaintiffs contend only that this case does not present the above question to the Court, on the theory that the Internal Revenue Service ("Service") positions involved here were "insignificant." (*Id.*)

Contrary to the plaintiffs' assertion, this case squarely presents the issue for review. The evidence demonstrates that the Service's guidance on the meaning of "termination of employment" and similar terms [3] *at that time* played a key role in Quantum's actions. (Sixth Circuit Joint Appendix, Vol. II, pp. 374, 415-16) Plaintiffs concede that, at the time Quantum sold its Emery Division in April 1989, the Service had indicated that its "same desk rule," which holds that a "separation from service" does not occur where an employee continues in the same job for another employer, applied to Code plan qualification requirements. *See* Private Letter Ruling 8614060 (June 13, 1986). The tax qualification of the Plan is hardly an "insignificant" consideration.

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[3] Under the Internal Revenue Code ("Code") and ERISA, a number of important participant rights hinge upon whether a "termination of employment," a "severance from employment" or a "separation from service" has occurred with respect to a plan participant. *See, e.g.*, Code § 401(k)(2)(B)(i)(I) (distribution from a cash or deferred arrangement permissible upon a "separation from service"), Code § 402(d)(4) (availability of preferential tax treatment upon a "separation from service") and Revenue Ruling 56-693, 1956-2 C.B. 282 (pension plan payment of benefits prior to "severance from employment" disqualifies the plan). Over the years, the Service has issued considerable guidance defining these terms in various contexts.

The Service positions involved here were significant and relevant because of their potential impact on the Plan's tax-exempt status. As this case demonstrates, a court's failure to consider that impact may have far-reaching and unintended results. As one commentator on the *Wulf* case stated:

> Every once in awhile a reported decision will send tremors through the benefits community when a court interprets a term that is found in most employee benefit plans without appreciating the implication the decision could have on a benefits practice that has existed since the enactment of ERISA. *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368 (6th Cir. 1994) . . . is such a decision. If the reasoning in *Wulf* is followed in other circuits, there will be a chilling effect on plan spinoffs and mergers in corporate transactions, which over the long term will negatively impact the benefit security of plan participants; the short term may see a flurry of potential claims reported under fiduciary responsibility and malpractice policies.
>
> * * * *
>
> Judge Lively made a fatal detour when he then interpreted "termination of employment" in a literal sense without considering how that term had been interpreted by the [Service] in the context of plan qualification requirements. It is doubtful that the court would have reached the same conclusion if it had understood that its interpretation could result in the disqualification of pension plans and cash or deferred plans ("401(k) plans") that are transferred to or assumed by a buyer in a corporate transaction.

Rizzo, *6th Circuit Opinion May Halt Plan Spinoffs and Mergers*, 3 ERISA Litigation Rep. No. 4 at 3, 9.

To require, as the majority of the Sixth Circuit did in this case, plan administrators to interpret ERISA plans without at least one eye toward Code interpretations by the Service creates an irreconcilable conflict for ERISA plan fiduciaries, who must attempt to comply with both

statutes. That conflict, contrary to the plaintiffs' assertion, is highly significant, both for this Plan and for every other pension plan that is caught in a corporate transaction. This case, of far-reaching consequences, clearly presents a question that warrants review by this Court.

CONCLUSION

For the reasons stated above, petitioners Quantum Chemical Corporation and Quantum Employee Stock Ownership Plan for Hourly Employees request this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals of the Sixth Circuit.

Respectfully submitted,

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